(3)

No. 93-1543

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CHRISTINE MCKENNON,
Petitioner,

v.

THE NASHVILLE BANNER PUBLISHING COMPANY,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

MOTION AND BRIEF *AMICI CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS, WOMEN'S LEGAL DEFENSE FUND, OLDER WOMEN'S LEAGUE, FEDERALLY EMPLOYED WOMEN, NATIONAL TREASURY EMPLOYEES UNION, AND THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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As counsel of record for amici curiae the Women's Legal Defense Fund, Older Women's League, Federally Employed Women, National Treasury Employees Union, and National Employment Lawyers Association,[1] the American Association of

[1] The interests of the other amici are set forth in the brief. In an effort to save the Court's time, their interests will not be fully stated here; it need only be said that all amici are legitimately concerned about the conflict between the circuits concerning the application of the after-acquired evidence doctrine.

Retired Persons (AARP), 601 E Street, N.W., Washington, DC, 20049, respectfully moves for leave to file a brief amici curiae in support of Petitioner.

In support of this motion AARP declares:

1. AARP is a non-profit membership organization of more than 33 million persons age fifty and older. In representing the interests of its members, AARP seeks to: enhance the quality of life of older Americans through service, advocacy, education and volunteer efforts.

2. Approximately 14 million of AARP's members are employed individuals age fifty and older, most of whom are protected by the Age Discrimination in Employment Act of 1967, as amended, (ADEA), 29 U.S.C. § 621 et seq., and Title VII of the Civil Rights Act, as amended (Title VII), 42 U.S.C. § 2000e et seq.

3. One of AARP's primary goals is to achieve dignity and equality in the workplace through positive attitudes, practices, and policies toward work and retirement. AARP seeks to: (1) assist employers to recruit, train, and retain an aging and increasingly diverse work force, (2) help empower persons to make informed employment and retirement decisions, and (3) advocate enforcement of non-discriminatory rules, policies, and practices related to age in the workplace.

4. AARP's advocacy efforts are made through legislative, administrative and judicial action, including litigation under the ADEA. Since March 1985, AARP has filed more than seventy-five amicus curiae briefs in the United States Supreme Court, Courts of Appeals, and District Courts on employment and benefits issues.

5. This litigation presents a critical issue of law regarding the enforcement of the ADEA and Title VII. The brief of the amici curiae focuses on the conflict among the circuits regarding the application of the after-acquired evidence doctrine and the doctrine's impact on the enforcement of the ADEA and Title VII.

6. The resolution of the legal issues raised in this petition for certiorari will have an impact extending far beyond the parties in this litigation. The decision below has an adverse impact on the public interest in the enforcement of the ADEA and Title VII and on the rights of workers. For these reasons, the issue raised herein is of critical importance to AARP, its members, and to the other amici.

7. Counsel for Petitioner has consented to the filing of an amicus curiae brief by AARP.

8. Counsel for Respondent has denied consent to AARP's filing this amici curiae brief.

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INTERESTS OF AMICI CURIAE

The American Association of Retired Persons (AARP) is a non-profit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. More than one-third of AARP's thirty-three million members are employed, most of whom are protected by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq., and Title VII, 42 USC § 2000e et seq. of the Civil Rights Act of 1964 (Title VII). One of AARP's primary objectives is to strive to achieve dignity and equality in the workplace through positive attitudes, practices, and policies towards work and retirement. In pursuit of this objective, AARP has participated as

amicus curiae in numerous discrimination cases before this Court and the federal courts of appeals.

The Women's Legal Defense Fund (WLDF) is a national advocacy organization that was founded in 1971 to advance the rights of women in the areas of work and family. The WLDF works to challenge gender discrimination in the workplace through litigation of significant sex discrimination cases, public education, and advocacy for improvements in the equal employment opportunity laws and their interpretation before Congress and the federal agencies charged with their enforcement. In pursuit of this objective, WLDF has participated as amicus curiae in numerous discrimination cases before this Court.

The Older Women's League is a non-profit membership organization whose primary mission is to advance the status of midlife and older women. Although midlife and older women represent the fastest growing segment of the workforce, they continue to be underpaid and face the combined obstacle of age and sex discrimination.

Federally Employed Women, Inc. (FEW) is a non-profit, membership organization which represents over one million active and retired women employed by the federal government. Since its inception in 1968, FEW has developed programs which focus on two primary goals: to eliminate sex discrimination and sexual harassment and enhance career opportunities for women in government.

The National Treasury Employees Union (NTEU) is a federal sector labor organization that represents approximately 150,000 federal employees nationwide. In addition to serving as their collective bargaining representative, NTEU frequently represents employees in administrative and judicial proceedings seeking to vindicate their rights under the Age Discrimination in Employment Act (ADEA) and Title VII of the Civil Rights Act of 1964 (Title VII).

The National Employment Lawyers Association (NELA) is a national bar association of over 1800 lawyers who regularly represent employees in employment-related disputes. NELA

members thus represent many victims of age discrimination. NELA has a compelling interest in ensuring that the ADEA goal of eradicating employment discrimination is fully realized.

All amici are vitally interested in the application of the after-acquired evidence doctrine to employment discrimination cases and are concerned about the conflict between the circuits on this issue.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ of certiorari because: (1) there is a serious conflict between the circuits about the applicability of after-acquired evidence in employment discrimination cases, and (2) the test used by the Sixth and Tenth Circuits fundamentally undermines the deterrent and make-whole purposes of the ADEA, Title VII, and the other civil rights statutes.

I. A CONFLICT EXISTS BETWEEN THE CIRCUITS AND A PLETHORA OF TESTS ARE USED IN ANALYZING THE APPLICABILITY OF AFTER-ACQUIRED EVIDENCE.

A. The Sixth And Tenth Circuit's "Complete Bar" Rule Conflicts With The Eleventh Circuit's Two-Step Approach.

A morass of conflicting tests and unclear holdings exist in the area of after-acquired evidence in the employment discrimination context.[1] Three circuits, the Sixth, Tenth and Eleventh, have squarely addressed the issue of after-acquired evidence in the

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[1] "The circuit courts have not spoken with one voice on the use of such evidence." Puhy v. Delta Air Lines, 833 F. Supp. 1577, 1581 (N.D. Ga. 1993). "Indeed, the circuits are divided on this issue." Milligan-Jensen v. Michigan Technological Univ., 925 F.2d 302, 304 (6th Cir. 1992), cert. granted, 113 S. Ct. 2991, cert. dismissed, 114 S. Ct. 22 (1993).

employment discrimination context[2] and three other circuits have addressed the issue less directly.[3]

However treacherous and slippery the path through this case law mire, the decisions can be grossly divided into two groups. The two broad categories into which all decisions fall are those which use such evidence to completely bar any recovery by plaintiff and those which do not.[4] The Sixth and Tenth Circuits

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[2] But see, Massey v. Trump's Castle Hotel & Casino, 828 F. Supp 314, 320 (D.N.J. 1993), where the court indicates that in addition to these three circuits, the Seventh Circuit has also spoken directly on the issue.

[3] At least three circuits have indirectly weighed in on this issue without much explanation. In Smallwood v. United Air Lines, 728 F.2d 614 (4th Cir.), cert. denied, 469 U.S. 832 (1984), the Fourth Circuit adopted a modified complete bar rule in cases where the employer would have made the same decision (refusal to hire or discharge) at issue in the case. In Lloyd v. Georgia Gulf Corp., 961 F.2d 1190 (5th Cir. 1992) (age discrimination under state law), the Fifth Circuit affirmed the district court's refusal at trial to permit an employer to admit after-acquired evidence of an employee's job performance to support its reasons for terminating plaintiff. This opinion implicitly places the Fifth Circuit into the Eleventh Circuit's "no complete bar" group. Two Seventh Circuit cases in which the issue was addressed are: Washington v. Lake County, Ill., 969 F.2d 250, 255 (7th Cir. 1992) (affirming summary judgment for employer in Title VII termination case where resume fraud was such that plaintiff would have been fired earlier had employer known the truth) and Smith v. General Scanning, Inc., 876 F.2d 1315 (7th Cir. 1989) (resume fraud does not preclude ADEA plaintiff from establishing prima facie case but summary judgment for employer affirmed on other grounds).

[4] The courts even differ as to the number of tests that they believe are in use. Compare Puhy v. Delta Air Lines, 833 F. Supp. 1577, 1581 (N.D. Ga. 1993) (three tests) with Massey v. Trump's Hotel & Casino, 828 F.Supp 314, 318-322 (D.N.J. 1993) (four tests). We use a two-category analysis in this brief simply for clarity. There are certainly variations, which could be considered separate tests, within the latter "no complete bar group."

have adopted a "complete bar" rule that, even presuming that plaintiff has established a prima facie case of discrimination, denies the plaintiff any recovery whatsoever.[5] This directly conflicts with the Eleventh Circuit's two-step approach ("no complete bar") that permits after-acquired evidence to be used only in determining which remedies may be available to a prevailing plaintiff. Within this latter "no complete bar" group, courts use various two-step tests -- first to determine whether a violation has occurred and second, given the after-acquired evidence against a plaintiff who has proved his/her case, to determine what remedies are available. See, e.g., Moodie v. Federal Reserve Bank of N.Y., 831 F. Supp. 333, 336 (S.D.N.Y. 1993).

Petitioner seeks review of a decision of the Sixth Circuit Court of Appeals which, along with the Tenth Circuit, utilizes the most harsh approach. These courts permit the after-acquired evidence rule to completely shield a discriminating employer from a determination of liability and an assessment of damages. When the employer can show that the after-acquired evidence was such that the plaintiff would not have been hired or would have been fired had the employer known of it,[6] the employer is totally

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[5] Summers v. State Farm Mut. Auto. Insur. Co., 864 F.2d 700 (10th Cir. 1988) is the seminal case for the rule that mandates that material after-acquired evidence is a complete bar to an employment discrimination plaintiff's right to be awarded any remedies even assuming that discrimination occurred. This test adopted by the Sixth Circuit in Johnson v. Honeywell Information Systems, 955 F.2d 409, 415 (6th Cir.), and reaffirmed in Milligan-Jensen, 975 F.2d at 304 and the instant case, will be referred to herein as the "complete bar" test. McKennon v. Nashville Banner Publishing, 797 F. Supp. 604 (M.D. Tenn. 1992) (McKennon I), aff'd., 9 F.3d 539 (6th Cir. 1993) (McKennon II).

[6] One of the disturbing aspects of the after-acquired evidence doctrine's use is the frequent acceptance by the courts of self-serving employer affidavits as the sole and conclusive proof of what the employer would have done if only it had known about the after-acquired evidence. In the instant case, the district court accepted the Respondent's President's affidavit as proof that it would have terminated her had it known of her photocopying activities. McKennon I, App. 16a. See

immunized from liability for the discrimination. Courts employing this complete bar analysis presume that the employee has not been injured by the discrimination. Milligan-Jensen, 975 F.2d at 305.[7] Thus, the existence of the discrimination is deemed irrelevant, no liability determination is made, and no remedies are available to plaintiff.

In sharp contrast to the complete bar rule, a two-step test is used by the Eleventh Circuit.[8] This approach balances an "employer's lawful prerogatives and the restoration of the discrimination victim." Wallace, 968 F.2d at 1181. The Eleventh Circuit's standard does not allow after-acquired evidence to preclude a liability determination; the evidence is only utilized in analyzing which remedies are available to a prevailing plaintiff.

Not only do courts "differ over whether such evidence should preclude the entire claim or only the remedies of reinstatement and front-pay," they also differ as to "whether any distinction must be

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Washington v. Lake County, Ill., 969 F.2d 250, 252 (7th Cir. 1992) (affidavits by two of employer's managers accepted as proof plaintiff would have been fired had employer known about errors on her application form even though employer had never before discovered falsifications on an application); O'Driscoll v. Hercules, Inc., 745 F. Supp. 656, 659 (D. Utah 1990) (employer's affidavits accepted as proof plaintiff would have been terminated).

[7] But see Massey, 828 F. Supp. at 322. Referring to discriminatory discharges, the court stated, "It is problematic at best to say there has been no injury in the face of proven illegal conduct . . . . Absent illegal motives, the employee would still be employed. Thus, an illegal discharge causes an injury regardless of an employee's previous misconduct, and that injury must be subject to same redress."[footnote omitted]. Petitioner, like the plaintiff in Massey, brought a termination claim. Due to her thirty-nine year highly-rated performance with Respondent, we assert that absent the discrimination Petitioner would still be employed. Thus, an argument that she was not injured by the discrimination is spurious.

[8] Wallace v. Dunn Const. Co., Inc., 968 F.2d 1174 (11th Cir. 1992).

drawn between employee misconduct in falsifying an employment application ['resume fraud'] and misconduct that occurred during the plaintiff's tenure as an employee." Massey, 828 F. Supp. at 318; see, e.g., Washington v. Lake County, Ill., 969 F.2d 250, 255 (7th Cir. 1992) (whether the after-acquired evidence is resume fraud or job misconduct does not matter; the applicable standard is whether the employer would have fired plaintiff if it had known of the misconduct); Puhy, 833 F. Supp. at 1581 (Wallace analysis not directly applicable to instant case since Wallace was a wrongful termination case and this case concerns the failure to hire); Boyd v. Rubbermaid, 1992 WL 404398 (W.D. Va. 1992) (court denies employer's summary judgment motion in Equal Pay Act case with both types of after-acquired evidence -- resume fraud and post-hire misconduct; court makes no distinction between the two).

In addition, when prevailing plaintiffs are deemed eligible for backpay, the courts differ as to the time period for which recovery is available. Some courts calculate back pay at the time the after-acquired evidence is discovered, Kristufek v. Hussmann Foodservice Co., 985 F.2d 364, 371 (7th Cir. 1993), and others deem backpay awards to include the time elapsed through the date of judgment. Wallace, 968 F.2d at 1182; Smith v. General Scanning, Inc., 876 F.2d at 1319 n.2; Massey, 828 F. Supp. at 323. There are even inconsistencies among district courts within the same circuit.[9] This morass compels review and resolution by this Court.

B. By Granting Certiorari In June 1993 In Milligan-Jensen, The Court Has Recognized That The Conflicting Approaches To The After-Acquired Evidence Doctrine Demand Review.

Less than a year ago, the Court acknowledged the conflict between the courts of appeals regarding the use of the after-

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[9] Compare e.g., Russell v. Microdyne Corp., 830 F. Supp. 305 (E.D. Va. 1993) with Boyd v. Rubbermaid, 1992 WL 404398 (W.D. Va. 1992) and Wallace v. Dunn Construction Co., 968 F.2d 1174 (11th Cir. 1992) with Puhy v. Delta Air Lines, 833 F. Supp. 1577 (N.D. Ga. 1993).

acquired evidence doctrine in employment discrimination cases by granting certiorari in another Sixth Circuit case, Milligan-Jensen v. Michigan Technological Univ., 975 F.2d 302 (6th Cir. 1992), cert. granted, U.S. 113 S. Ct. 2991, cert. dismissed, 114 S. Ct. 22 (1993) (Title VII). However, because that case settled before briefing or argument, the Court was unable to address the serious conflict in the circuits presented by the after-acquired evidence doctrine. This case, like Milligan-Jensen, presents the Court with an ideal opportunity to resolve the ongoing conflict.

The instant case is very similar to Milligan-Jensen; both are Sixth Circuit employment discrimination cases for which the after-acquired evidence was deemed a complete bar "to any recovery by the former employee where the employer can show it would have fired the employee on the basis of the evidence." McKennon II, App. 6a. (footnote omitted).

Petitioner Christine McKennon, who was age sixty-two when terminated, had worked for thirty-nine years for Respondent newspaper, primarily as a secretary. McKennon II, App. 2a. Her employer had "consistently evaluated her work performance as excellent." Id. She was terminated in 1990 and brought suit in 1991 alleging that her termination was the result of age discrimination under the ADEA and the Tennessee Human Rights Act, Tenn. Code Ann. 74-21-101 et seq., McKennon I, App. 11a.

McKennon had become fearful of losing her job more than a year before her termination. Sixth Circuit Joint Appendix, McKennon Affidavit, p. 94. The fear was created by several factors, including statements from her supervisor, Respondent's Comptroller, that employee terminations were imminent due to dire financial circumstances. Id. Moreover, the Comptroller repeatedly asked her about her retirement plans and sua sponte presented her with detailed information about her retirement benefits. Id.

In response to her supervisor's comments, McKennon photocopied several pages of financial documents and the severance package negotiated by a terminated employee. See McKennon I, App. 11a. Later, she took these papers home to discuss them with her husband. These papers were some of the

many papers she maintained in her office during the normal course of business and to which she had legitimate access. More than half a year after McKennon copied the papers, she was terminated. At the time of her termination, Respondent had no knowledge of her photocopying activities.

Within days of McKennon's deposition testimony about her photocopying, and yet more than fourteen months after her termination, Respondent sent her a self-serving "termination" letter based on the misconduct revealed at the deposition. See McKennon II, App. 2a. The district court, relying on Summers and Johnson, granted Respondent's motion for summary judgment, precluding relief for McKennon, even assuming she had been subjected to age discrimination. McKennon I, App. 13a-18a. The Sixth Circuit affirmed. The Sixth Circuit reiterated its prior adoption of the Summers complete bar rule. McKennon II, App. 5a-7a. Since the employer claimed that it would have terminated McKennon had it known of her misconduct, the court ruled that the misconduct had made her ineligible to receive any remedy whatsoever. The court also found that the alleged nexus between McKennon's misconduct and the discrimination claim was irrelevant to the application of the after-acquired evidence doctrine. McKennon II, App. 8a.

The need for review of this case by the Court is also heightened by the decision in ABF Freight System, Inc. v. NLRB, 114 S. Ct. 835 (1994). In ABF Freight System, a decision in which all the Justices concurred, the Court held that the National Labor Relations Board (NLRB) did not abuse its discretion in providing make whole relief to a plaintiff who was discharged because of his union activities and who was later proven to have lied during NLRB proceedings. In rejecting the employer's after-acquired evidence arguments, the Court noted,

> [W]e cannot say that the Board's remedial order in this case was an abuse of its broad discretion or that it was obligated to adopt a rigid rule that would foreclose relief in all comparable cases. Nor can we fault the Board's conclusions that [the employee's] reason for being late to work was ultimately irrelevant to whether antiunion animus

> actually motivated his discharge and that orderin g effective relief in a case of this character promotes a vital public interest.

ABF Freight System, 114 S. Ct. at 840. Surely, the proper use of after-acquired evidence in employment discrimination cases is as vital to the public interest as it is in the labor relations context.

The Court's recognition of the need to address the after-acquired evidence doctrine is demonstrated by its acceptance of review in Milligan-Jensen and ABF Freight System. There remains a serious split between the circuits as to the application of the after-acquired evidence doctrine to a wide range of employment cases. Similarly, this case is worthy of review by the Court.

II. THE COMPLETE BAR RULE USED BY THE SIXTH AND TENTH CIRCUITS UNDERMINES THE PURPOSES OF THE ADEA AND OTHER CIVIL RIGHTS STATUTES.

Employment discrimination is against public policy and harmful to society as a whole. See Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 410 (1985); Price Waterhouse v. Hopkins, 490 U.S. 228, 264-65 (1989) (O'Connor, J., concurring). Congress enacted both the ADEA and Title VII to deter unlawful employment discrimination and to make discrimination victims whole for their injuries. See Lorillard v. Pons, 434 U.S. 575 (1978); Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975). Accordingly, an employee's right to work free of discrimination derives from the civil rights statutes themselves,[10] not from any contract theory of employment, as

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[10] See, e.g., Price Waterhouse, 490 U.S. 228, 264-65 (1989) (O'Connor, J. concurring); Wallace, 968 F.2d at 1181 n.10 ("Title VII and the EPA create standing for [the plaintiff alleging discrimination claims.]"; Bazzi v. Western and Southern Life Ins., 808 F. Supp. 1306 (E.D. Mich. 1992) ("The duty of the employer with respect to refraining from acts of discrimination based on national origin does not arise from the [employment] contract, but rather is imposed by [Title VII and the state fair employment statute.]").

some courts have implied.[11] By using after-acquired evidence to deny a plaintiff the opportunity to prove her claim and recover damages, as was done here, both purposes -- deterrence and the restoration of victims to "wholeness" -- are severely undermined. Massey, 828 F. Supp. at 323.

The use of after-acquired evidence as a complete bar to liability has the perverse effect of fostering employer misconduct rather than deterring it. Wallace, 968 F.2d at 1182. Employers will not be inclined to "self-examine and self-evaluate their employment practices."[12] Instead, employers will be encouraged to conduct a thorough post hoc review of every document written and every word spoken by plaintiffs in hopes of finding tiny morsels of undesirable information to shield the employers from the consequences of their unlawful activities.

The deleterious effect of the Sixth and Tenth Circuit's complete bar rule in employment discrimination cases cannot be overstated. The use of such evidence eviscerates both the enforcement[13] and remedial purposes of the ADEA, Title VII and

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[11] E.g., Summers, 864 F.2d at 708; O'Day v. McDonnell Douglas, 784 F. Supp. 1466, 1469 (D. Ariz. 1992).

[12] Id., citing Albemarle Paper, 422 U.S. at 417-18, quoting Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) and United States v. N.L. Indus., 479 F.2d 354, 379 (8th Cir. 1973).

[13] The complete bar rule interferes with the use of the McDonnell Douglas paradigm in the presentation and refutation of proof of discrimination. See Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) (to determine if an illegal motive was present, the employer must be asked "at the moment of the decision what its reasons were" for the action taken); Smith v. Equitable Life Assurance Soc., 1993 WL 15485, at *4 (S.D.N.Y. 1993) ("McDonnell Douglas, which sets forth the shifting burdens in a Title VII case, clearly presupposes a 'legitimate,

other civil rights statutes. The complete bar rule used by courts, such as the Sixth and Tenth Circuits, insulates discriminatory actions by employers against employees. The complete bar rule has a chilling effect on applicants and employees who would otherwise exercise their statutory rights to file charges and institute litigation.[14] In effect, the Sixth Circuit's rule superimposes a "perfect plaintiff" eligibility requirement for enforcing the civil rights laws. There is nothing in the statutory language or legislative history of these laws to support such a prerequisite to recovery.

In short, this court-fashioned rule seriously damages both the remedial and make-whole purposes of the ADEA and Title VII. The rule goes to the very heart of -- indeed the very reasons for -- the existence of the civil rights statutes -- eliminating discrimination and compensating discrimination victims for their injuries.

CONCLUSION

AARP, the Women's Legal Defense Fund, the Older Women's League, Federally Employed Women, the National Treasury Employees Union, and the National Employment Lawyers Association respectfully support Petitioner's writ of certiorari to the Sixth Circuit and respectfully urge the Court to grant review of this case. Such review is imperative to resolve the conflict

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nondiscriminatory reason' known to the employer at the time of the employee's discharge.").

[14] "[T]he use of after-acquired evidence to bar a discrimination claim in its entirety could cause employees who did something wrong in the past to quietly endure discriminatory treatment rather than complain, regardless of how long ago the misconduct or its triviality." Massey, 828 F. Supp. at 323.

between the Sixth, Tenth and Eleventh Circuits and to prevent the erosion of the deterrent and "make whole" purposes of the ADEA and Title VII.

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